No. 04-33 JUL 6 - 2004

In The

Supreme Court of the United States

LARRY FLYNT and L.F.P., Inc.,

Petitioners,

v.

DONALD H. RUMSFELD,
In his official capacity as
Secretary of Defense and
DEPARTMENT OF DEFENSE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. If the government restricts access to a combat zone where American troops are engaged in battle, must it administer its press access program pursuant to procedures and standards that meet First Amendment requisites?

2. Should the question of whether a First Amendment right of press access to the battlefield exists be decided by reference to this Court's analysis in *Houchins v. KQED*, 438 U.S. 1, 98 S.Ct. 2588 (1978), or by use of the test set forth in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814 (1980).

3. Should Respondents' motion to dismiss the amended complaint have been granted without allowing Petitioners any discovery?

PARTIES TO THE PROCEEDING

LARRY FLYNT
and
L.F.P., INC.,

Petitioners.

DONALD H. RUMSFELD
In his official capacity as Secretary of Defense,
and
DEPARTMENT OF DEFENSE,

Respondents.

PARENT AND SUBSIDIARY COMPANIES

Petitioners have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

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JURISDICTION OF THIS COURT

The order of the Circuit Court of Appeals for the District of Columbia affirming the judgment of the United States District Court dismissing Petitioners' amended complaint was issued on February 3, 2004. The order of the Court of Appeals denying Petitioners' petition for rehearing was issued April 7, 2004. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 and Rules 10 (a) and (c) of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment I

- Set forth in Appendix

United States Constitution, Amendment V

- Set forth in Appendix

Department of Defense Directive 5122.5, Enclosure 3, "Statement of DOD principles for News Media"

- Set forth in Appendix

Fed. R. Civ. P. 12 (b)

- Set forth in Appendix

STATEMENT OF THE CASE

I. Introduction

Journalists in a combat zone shall be credentialed by the U.S. military and shall be required to abide by a clear set of military security ground rules that protect U.S. Armed Forces and their operations. Violation of the ground rules may result suspension of credentials and expulsion from the combat zone of the journalist involved.

Department of Defense Directive 5122.5, Enclosure 3, ¶ 3.1.4

Under this Directive, the Department of Defense substantially restricted press access to American combat operations on battlefields in Afghanistan during Operation Enduring Freedom. Though American journalists and publishers historically had great access to combat zones, and at least through the end of the Vietnam War regularly reported from the battlefield, press coverage of United States combat actions in later conflicts has been more tightly controlled. This Department of Defense-ordered restricted press access remained the rule during the military conflicts in Grenada, Panama, the Persian Gulf War, and Operation Enduring Freedom.

In Afghanistan, the Department of Defense used its control of access to the combat zone to deny Petitioners' requests for permission to report on the actions of American soldiers under fire on the battlefield. Petitioners maintain that this "credentialing" and combat zone approval scheme is essentially a press access-licensing program administered at the discretion of Department of Defense. The fundamental question before this Court is whether superintendence of the combat zone press access system is subject to minimum First Amendment protections. Since this is an important question of federal law that has not yet

been decided by this Court, Petitioners respectfully submit that review on certiorari should be granted. Sup. Ct. R. 10.

II. Factual Background and Case History

Soon after President George Bush announced that the United States had commenced military action against al Qaeda terrorist training camps and the Taliban regime in Afghanistan during October 2001, Larry Flynt, the publisher of *Hustler* magazine, requested in a letter to the Honorable Victoria Clarke, Assistant Secretary of Defense for Public Affairs, that *Hustler* magazine correspondents be allowed to accompany and report on American ground forces in Afghanistan. (Appendix ["A"] 92-94). Having demonstrated a commitment to press coverage of international terrorism long before September 11, 2001 (A 92-93, 105-06), Flynt explained *Hustler's* history of reporting on terrorism and the Taliban, and expressly requested that "*Hustler* correspondents be permitted to accompany ground troops on combat missions and that said correspondents be allowed free access to the theater of United States military operations in Afghanistan and other countries where hostilities may be occurring as part of Operation Enduring Freedom" (A 93). No request for transportation, housing or protection of *Hustler's* correspondents was made. Flynt promised that the *Hustler* magazine correspondent would obey any rules the military deemed necessary for operational security (A 94).

Two weeks later, having received no response from Assistant Secretary Clarke to his first application for permission to have *Hustler* magazine correspondents accompany and report news of American ground troops in combat on battlefields in Afghanistan, Flynt wrote Clarke again on November 12, 2001 (A 95-96). Emphasizing that "obtaining permission to provide the American public with first hand battlefield reportage is of great importance to

me," Flynt repeated his request that *Hustler* reporters be permitted to accompany ground troops in combat (A 95).

The Department of Defense finally responded to Flynt in an undated letter faxed to him by Assistant Secretary Clarke's office on November 15, 2001 (A 97-98). While agreeing that "a free press, including its coverage of military operations, is critical to upholding one of the fundamental principles upon which this country was founded," Assistant Secretary Clarke refused to grant the access to ground troop combat operations requested by Flynt on behalf of L.F.P., Inc. and *Hustler* magazine. Instead, Clarke pointed out that other forms of limited press access not requested by *Hustler* were available, including coverage of air strikes, humanitarian aid drops, and interviews of men and women serving in the region (A 98). According to Clarke, access to coverage of ground troops in Afghanistan could not be granted because all of the troops were engaged in undefined "special operations activity," making it difficult to embed media (A 98).

Having been denied permission to have *Hustler* correspondents cover the actions of American soldiers in combat on battlefields in Afghanistan, Flynt and L.F.P, Inc. filed the instant lawsuit in the District Court on November 16, 2001, seeking a declaration of their constitutional rights of press access to the battlefield under 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure (A 74-91). Flynt challenged the Department of Defense's restrictive press access policies on the grounds, *inter alia*, that (1) enforcement of the policies denied Petitioners access to information gathering and news reporting forums traditionally open to American journalists, and violated the First Amendment of the United States Constitution; and (2) through the enforcement of the Department of Defense press access policies, Respondents had imposed an unlawful content-based prior restraint that deprived Petitioners of

their fundamental press freedoms as guaranteed by the First Amendment (A 86-89).

Thereafter, the District Court considered Flynt's motion for a preliminary injunction to restrain enforcement of the Department of Defense press access rules. In a Memorandum Opinion and Order filed January 8, 2002, the Honorable Paul L. Friedman concluded that:

This Court is persuaded that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news involving United States military operations on foreign soil subject to reasonable regulations to protect the safety and security of both the journalists and those involved in those operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or our allies or compromise military operations. (A 139).

Despite this determination, however, the District Court refused to grant the requested preliminary injunction, citing increased media access to Afghanistan since Petitioners had filed suit, and observing that the balance of harms and the public interest weighed in Respondents' favor (A 141). Significantly, the court recognized that the Department of Defense had asserted its commitment to press access to military operations in Afghanistan only "somewhat vaguely and with minimal detail," and warned that "[w]hether defendants are doing enough to satisfy the First Amendment or the Due Process Clause are questions that will have to await the development of a fuller record" (A 141).

Petitioners thereafter renewed their specific request for permission to have a *Hustler* reporter "cover actual combat activity carried out in connection with the current

military campaign known as Operation Enduring Freedom" (A 146-47). In a January 15, 2002 letter to Assistant Secretary Clarke, Flynt explained that he had not pursued the limited and non-combat press access Clarke had previously offered because *Hustler* wished to cover ground combat operations, and again asked permission for such coverage, subject to military operational security rules (A 146-47).

More than two weeks later, Petitioners still had not heard back from the Assistant Secretary of Defense concerning their request for permission to have a correspondent report on the continuing American ground troop combat activities in Afghanistan. Accordingly, on January 30, 2002, Flynt sent yet another letter to Assistant Secretary Clarke, emphasizing the time-sensitive nature of *Hustler* magazine's request for press access, and pointing out that the Defense Department's own press conferences confirmed that U.S. combat actions *Hustler* desired to cover (e.g., the January 24, 2002 attack on Hazar Kadam, Afghanistan) continued to occur while Respondents deliberated Petitioners' press access request (A 148-49).

By letter dated February 4, 2002, Assistant Secretary Clarke finally advised Flynt that the Department of Defense relied on Directive 5122.5 in making decisions on press access matters, and provided him with a list of contact numbers for Public Affairs officers involved in Operation Enduring Freedom (A 150-51). Clarke did not specifically address Flynt's request for permission to have a correspondent cover American ground forces' combat zone operations in Afghanistan, but the contact numbers identified who to contact if *Hustler* wanted to have a reporter "embed" with land forces (A 152-53).

Through the exchange of various correspondences in the ensuing weeks, arrangements were made to have veteran war correspondent David Buchbinder join

American soldiers at Bagram air base in Afghanistan (A 159-69). Buchbinder arrived at Bagram air base on March 18, 2002 and immediately informed the responsible military officials that he wished to accompany combat troops in the field. He was advised to put his name on the "Notorious List"--a list of reporters who desired to accompany American soldiers on combat missions (A 180). Six weeks later, Buchbinder still had not been allowed to accompany American soldiers on any missions, combat or otherwise (A 185). More than half a year had passed since Flynt's original request to the Department of Defense for permission to have a correspondent witness and report on American forces in battle in the combat zone, yet such permission still had not been granted.

In pursuit of the "fuller record", recommended by the District Court in its January 8, 2002 opinion denying preliminary injunctive relief, Petitioners had filed an amended complaint on January 17, 2002 (A 99-129). The amended complaint presented ten claims, asserting foremost a request for a declaration that the First Amendment guaranteed Petitioners a right of press access to the battlefield, including *overt* combat operations, "subject to reasonable, necessary and definite regulations designed to protect the safety and security of both the journalists and those involved in military operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or allies or compromise military operations" (First Claim; A 116-17). Notably Petitioners did not seek a declaration that the First Amendment required the Department of Defense to transport, house, or otherwise accommodate members of the press. Flynt and L.F.P. Inc. also alleged that the Defense Department's "Statement of DoD Principles for News Media" (Enclosure 3 to Department of Defense Directive 5122.5) failed to recognize and protect their First Amendment rights of press access, and that Respondents

violated their constitutional rights when they denied Flynt's October 30, 2001 request for reporter access to battlefields in the combat zone —a forum traditionally open to American journalists--during Operation Enduring Freedom (Second, Third and Fourth Claims; A 117-21).

Petitioners further contended that the "Statement of DoD Principles for News Media" employed by Respondents did not contain constitutionally required definite and objective standards for use in determining press access requests, and allowed Department of Defense officials unfettered discretion to deny Petitioners' press access request for arbitrary, capricious or discriminatory reasons (Fifth Claim; A 121-22). Moreover, the "Statement of DoD Principles for News Media" failed to place reasonable time limits on the Defense Department's official decision-making with respect to a press access request (Sixth Claim; A 122-23), and did not provide for a prompt administrative appeal of Respondents' denial of Petitioners' application for press access to American ground forces in Afghanistan (Seventh Claim; A 123-24). Finally, Petitioners reiterated that respondents had imposed an unlawful content-based prior restraint on their exercise of traditional First Amendment press freedoms that could survive neither strict nor intermediate scrutiny (Eighth and Ninth Claims; A 124-25), and sought preliminary and permanent injunctive relief (Tenth Claim; A 125-26).

By a motion filed February 7, 2002, Secretary Rumsfeld and the Department of Defense moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) or, in the alternative, for summary judgment under Fed. R. Civ. P. 56(c) (A 143-44). In the face of Petitioners' opposition to the motion, the District Court found that Petitioners lacked standing to bring their as-applied claims because they had not shown that the Department of Defense had, in fact, denied their request for

access to ground forces in combat in Afghanistan (A 33-34). For similar reasons, the court also concluded that the as-applied claims of the amended complaint were not ripe for adjudication (A 28-33). As to Petitioners' facial challenges, however, the District Court refused to dismiss the amended complaint on prudential ripeness grounds (A 37), and rejected Respondents' contention that the political question doctrine rendered Petitioners' facial challenges non-justiciable (A 38-41). Yet, despite agreeing that "there may be a limited or qualified right of media access to the battlefield," the court ultimately concluded that it would be inappropriate to exercise its discretion under the Declaratory Judgment Act, expressing its hesitation "to announce such a significant principle of First Amendment protection in the context of a new application of the facial challenge mechanism, unmoored to a case or controversy in the traditional sense" (A 43, 46). Accordingly, Respondents' motion to dismiss was granted in an Order and Judgment dated February 14, 2003 (A 46-47).

On appeal, the Circuit Court disagreed with the District Court's determination that Petitioners lacked standing, and that their claims were not ripe. Noting that Flynt and L.F.P., Inc. had asked for immediate access to American ground troops engaged in combat, and that such access was not granted by the Department of Defense, the Court of Appeals concluded that Petitioners had suffered in "injury in fact," and that the constitutional press access question was presented in a concrete factual setting that made it fit for judicial review (A 9-10). The court, however, structured Petitioners' primary constitutional argument more broadly than the question they actually advanced. Rather than limiting the issue to that long pursued by Petitioners--merely that the First Amendment ensured at least a qualified right of press access to the combat zone--the Court of Appeals recast Petitioners' claims to include

requests for "accommodations and protections" of the press in addition to combat zone access (A 8, 10).

Consequently, while Petitioners sought only a qualified First Amendment right of press access to combat zones so their war correspondent could observe and report to the American people on the actions and sacrifices of American solders on the battlefield, the Circuit Court found no cognizable First Amendment right of press access to military "accommodations and protections" Petitioners never claimed the government was constitutionally obliged to offer (A 14-15). Accordingly, the Court of Appeals affirmed the District Court's dismissal of the facial claims of Petitioners' amended complaint on the ground that it was not an appropriate case in which to exercise the court's power to grant declaratory relief pursuant to 28 U.S.C. § 2201. The District Court's dismissal of the as-applied claims of the amended complaint was also affirmed on the ground that Petitioners had not stated a cognizable First Amendment claim, and had not shown that the Directive was applied to them in an unconstitutional way (A 15-16). Petitioners requested a rehearing pursuant to Fed. R. App. P. 40 to rectify the Court of Appeals' construction of their primary claim—and, particularly, the court's misapprehension that there were no government rules preventing a journalist from wandering the combat zone at will—but their petition was denied (A 50, 230-43).

REASONS FOR GRANTING WRIT

POINT I

IF THE GOVERNMENT RESTRICTS PRESS ACCESS TO A COMBAT ZONE WHERE AMERICAN TROOPS ARE ENGAGED IN BATTLE, IT MUST ADMINISTER ITS PRESS ACCESS PROGRAM PURSUANT TO PROCEDURES AND STANDARDS THAT MEET FIRST AMENDMENT REQUISITES

The central issue at the heart of the Court of Appeals' affirmance of the District Court's dismissal of Petitioners' amended complaint on a motion to dismiss prior to discovery is whether the First Amendment guarantees any right of press access to combat zones in which American soldiers are engaged in battle. Petitioners presented this issue squarely to the District Court, which refused to declare their constitutional rights in this regard, and on review the Court of Appeals also avoided deciding this fundamental issue, focusing instead on claims of constitutional entitlement Petitioners never made. Consequently, a serious controversy concerning the extent to which, if at all, the First Amendment affords the press a right of access to combat zones controlled by the U.S. military remains to be determined by this Court.[1]

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[1] Petitioners recognize that the Court rarely grants a writ of certiorari on the basis of erroneous factual findings. Sup. Ct. R. 10. Though this case contains such an error, it also presents an opportunity for this Court to determine, or order determination of, an important issue of law directly presented to the lower courts, but avoided by them.

The salient facts are clear: Respondents control press access to combat zones, and Petitioners asked for access to those combat zones so a war correspondent writing for *Hustler* magazine could observe and report on the battlefield actions of American soldiers. The central legal dispute has crystallized: Respondents contend that they can administer their press-access-to-combat-zones scheme without regard to the First Amendment; Petitioners believe that the Constitution affords at least a qualified First Amendment right of access to the battlefield.

Properly stated, the qualified right of access Petitioners advance does not require that the press "be accommodated and otherwise facilitated by the military in their reporting efforts during combat" (A 10). While Petitioners did seek permission to "accompany" American soldiers during combat (A 93), as a practical matter, coverage of war requires correspondents to be where the troops are fighting, and having journalists wandering the combat zone searching for battles appeared to defeat the purpose of the military's control of access to such zones. However, Petitioners did not, and do not, contend that the military is under any obligation, constitutional or otherwise, to furnish accommodations or other support to journalists in the combat zone. Petitioners seek to establish only that the First Amendment governs the administration of the Defense Department's combat zone press access program, and that question can, and should, be determined without regard to secondary accommodation issues that are not of a constitutional nature.

Confined to the precise constitutional principle Petitioners seek to vindicate, the courts below should have recognized that Petitioners' amended complaint stated a cognizable claim: that the First Amendment guarantees to the press a right of access to the battlefield that is qualified to the extent that certain limitations may be reasonably

necessary to protect the safety and security of those involved in combat operations, and the secrecy and confidentiality of information pertaining to those operations. Contrary to the view of the Court of Appeals, this Court's precedent supports the conclusion that a qualified right of press access exists.

Relying on cases such as *Houchins v. KQED*, 438 U.S. 1, 98 S.Ct. 2588 (1978), and *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), the Court of Appeals affirmed the District Court's dismissal of the amended complaint—without any discovery—by reference to circumstances where the federal courts have declined to find a right of access to government information sources of a domestic nature. This approach is counter-intuitive, and also ignores fundamental situational differences necessitating an analytical approach to battlefield access issues distinctly oriented to the unique nature of that First Amendment context. Moreover, the Court of Appeals' reasoning stands in direct opposition to Supreme Court precedent clearly establishing that the First Amendment may be interpreted to provide constitutional status to the freedom of the press to gather news, not just publish it.

Since 1791, the essential purpose of the free press clause of the First Amendment has been to ensure that the workings of government remain exposed to the people. The "free discussion of governmental affairs" intended by the First Amendment, *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434 (1966), requires public access to information concerning the operation of the government. The function of providing this information to the citizenry is left specifically to the press: "The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." *New York Times Co. v. United*

States, 403 U.S. 713, 717, 91 S.Ct. 2140 (1971) (Justice Black, concurring). As Justice Powell eloquently explained in his dissent in *Saxbe v. Washington Post*, 417 U.S. 843, 94 S.Ct. 2811 (1974), "[a]n informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic." *Id.* at 863, 94 S.Ct. 2811.

Advancement of First Amendment press freedoms often requires a uniquely contextual analysis. *See, Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586, 100 S.Ct. 2814 (1980) (Justice Brennan concurring). This is particularly true when the controversy concerns an attempt by the press to obtain access to the workings of government. In this instance, the Department of Defense contends that the press has no constitutional right of access to the operations of government, including even a battlefield. To a great extent, this argument, and the Court of Appeals' decision, is premised on the notion that the press has no greater First Amendment right of access to government information than the public at large. While that may be true by reference to the factual situations of the domestic news gathering cited referenced by the Court of Appeals, the battlefield context of Petitioners' exercise of the First Amendment right at stake here is a crucial distinguishing factor that sets this case apart from *Houchins v. KQED, supra,* and *Center for National Security Studies, supra,* and underscores the need for an analytical framework more sensitive to the important contextual differences presented by a battlefield access question.

For instance, unlike in *Houchins*, where a plurality of this Court concluded that the news media does not enjoy a special constitutional right of access to a county jail that is different than that of the public at large, *Id.* at 15-16, 98 S.Ct.

2588, citizens typically cannot obtain first-hand information concerning the government's conduct of a foreign war, and do not have alternative sources of such information readily at hand (as opposed to the variety of local sources of information available concerning prison conditions). Rather, the American people are heavily dependent on war correspondents for information concerning the progress of foreign armed conflicts and the use of United States military power in furtherance of national objectives. Thus, the press plays a crucial role in assuring that the national debate is fueled by information from independent, non-governmental sources such as newspapers, magazines, radio and television.

Moreover, though the *Houchins* plurality did note that the Court had "never intimated a First Amendment guarantee of a right of access to all sources of information within Government control," 438 U.S. at 9, 98 S.Ct. at 2593-94,[2] that statement was clearly made within the context of the special circumstances of KQED's request for prison access. Significantly, the plurality did not contend that the Constitution could not ever be interpreted to provide for a qualified right of press access to the battlefield.

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[2] Petitioners have never claimed a right of access to all information within Respondents' control. They have not requested that the federal government open up its operations to the media or that the federal government be required to collect or produce information for Petitioners' use. Petitioners seek to impose no duty upon Respondents to take affirmative steps to create information not generally available to members of the public. Rather, Petitioners simply seek access to a public place for the purpose of reporting on the government's exercise of its war-making powers in that locale.

The distinction between past cases addressing media requests that the government open the doors to institutions traditionally closed to the general public and the press access request made in the instant case underscores the need for an analytical approach that more precisely measures the degree of First Amendment protection attendant to a request for press access to a battlefield. The Court of Appeals' approach boils down to a theory that, in the absence of any prior holding on the merits of battlefield access, federal courts' rulings denying a constitutional right of press access in remarkably different domestic factual circumstances should also control whether Petitioners may prosecute their action concerning combat zone press rights. Petitioners submit that the logic of inapposite cases need not be followed to its bitter end, and that the unique nature of the battlefield access request at issue demands that the Court fashion a test befitting the circumstances before it. To that end, Petitioners contend that the approach adopted by the Supreme Court in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613 (1982), and *Richmond Newspapers, Inc. v. Virginia, supra*, and rejected by the Court of Appeals in the instant case, is most appropriate.

The historic openness of American criminal trials to both the public and the press obviously played an important role in the Supreme Court's determination that a right of access to such proceedings for both the public and the press is constitutionally guaranteed. Accordingly, the *Richmond Newspapers* decision recounts a lengthy history of public access to criminal trials as a prelude to the holding that such trials are presumptively open to the public, including the press. *Id.* at 581, 100 S.Ct. 2814. A similar approach was necessarily followed in *Globe Newspaper*, where the Supreme Court was confronted with a controversy concerning whether both the press and the general public could be excluded from the trial testimony of a minor victim in a sex

offense trial. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 602-05, 102 S.Ct. 2613.

The *Richmond Newspapers* and *Globe Newspaper* decisions are instructive not only in regard to their recognition of a First Amendment right of press access to criminal trials, but also as an example of how the Court in both cases evaluated the constitutional question before it using inquiries most germane to the type of access requested. Petitioners in the case at bar ask this Court to do no more.

Indeed, review of *Richmond Newspapers* reveals that the Court departed dramatically from the narrow reasoning of its prior decisions in *Saxbe v. Washington Post, Co., supra*, *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800 (1974), and *Houchins v. KQED, supra*. As the plurality opinion in *Richmond Newspapers* observed:

> It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated."

Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 576-77, 100 S.Ct. 2814 (citations and footnote omitted).

Significantly, in his concurring opinion in *Richmond Newspapers*, Justice Stevens observed that when a majority of the Court in *Houchins* neither accepted nor rejected the contention that the refusal of access to the prison abridged the First Amendment freedoms of speech and of the press, Justice Marshall and Justice Blackmun were unable to

participate in the decision. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 583, 100 S.Ct. 2814. However, with the participation of Justice Marshall and Justice Blackmun in the *Richmond Newspapers* decision, Justice Stevens emphasized that, "[t]oday, however, for the first time the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 583, 100 S.Ct. 2814.

Justice Brennan and Justice Marshall echoed Justice Stevens' comments in their own concurring opinion in *Richmond Newspapers.* Noting that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government," *Id.* at 587, 100 S.Ct. 2814, the Justices observed:

> Yet the Court has not ruled out a public access component to the First Amendment in every circumstance. Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality. These cases neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 586, 100 S.Ct. 2814 (citations omitted).

Thus, in the *Richmond Newspapers* decision we see an explicit recognition that the First Amendment may be interpreted to provide for a right of access to government operations, and that such right of access is not limited simply to criminal trials. Accordingly, *Houchins* and the other prison cases cannot be read as the definitive interpretation of whether the First Amendment provides protection for the right to gather news on the battlefield, as well as to publish it. Since the First Amendment "has a structural role to play in securing and fostering our republican system of self-government . . . An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 587-88, 100 S.Ct. 2814 (footnote omitted) (Justice Brennan concurring).

Petitioners contend that the unique role of the press in our democracy compels the conclusion that a right of press access to United States military operations in a foreign theater of war inheres in the free press clause of the First Amendment. Central to this analysis is the fact that, during war or other times of armed conflict, press representatives play a unique role in providing the American people with an independent source of information concerning the government's actions in the prosecution of a war in a setting where the vast majority of Americans do not have personal access. *See, Richmond Newspapers, Inc. v. Virginia, supra* at 580, 100 S.Ct. 2814 [noting that press organizations act as representatives of the public]. As proxy to an absent American public, the press is likely to be the only non-government source of information concerning the government's conduct of military action. "Having journalists on the scene ensures that the public eventually will get an independent account of the action. If journalists are not able to use the material they have gathered immediately because of operational security, they

nevertheless will have seen and recorded the events firsthand, and can provide their accounts to the public later." Jacqueline Sharkey, Under Fire: U.S. Military Restrictions on the Media From Grenada to the Persian Gulf (1991), p.32.

American history recognizes the vital role played by war correspondents and confirms the broad access to American soldiers in foreign military theaters traditionally afforded to the press. From the Revolutionary War through Vietnam, press representatives have been witness to unfolding military operations both overt and covert in nature.[3] For instance, reporters were allowed in front line trenches during World War I and had "easy access" to the battlefield in World War II, including landing at Normandy with Allied troops on D-Day. *See, generally,* John E. Smith, From the Front Lines to the Front Page: Media Access to War in the Persian Gulf and Beyond, Vol. 26, Colum. J.L. & Soc. Probs. 293-297 (1993). As Smith has noted:

> Both of the Globe standards are equally satisfied when applied to the right of press access to American military conflicts. First... the American media consistently has enjoyed access to military operations -- at least until Grenada. "The unbroken history of press presence at military operations strongly suggests that battlefields should be viewed as presumptively open to the press for purposes of the first amendment, thus satisfying the

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3 Of course, the precise extent to which reporters have been afforded access to battlefields in the past is a factual issue to be explored in discovery. The only issue presently before the Court is whether Petitioners have stated a cognizable claim.

> first prong of Justice Brennan's Globe test for the applicability of a right of access."

Id. at 309-10 (footnotes omitted).

This tradition of broad access to the war front continued during both the Korean War and Vietnam. *Id.* at 297-98. Indeed, press access to military operations reached its zenith in Vietnam:

> During the Vietnam War the press was granted virtually unlimited access to the areas surrounding military operations...The only official restrictions by DoD during the Vietnam War were guidelines that limited dissemination of specific kinds of combat information that military officials concluded compromised the national security of this country. In contrast, when the United States invaded Panama and Grenada, DoD placed significant restraints on media coverage, particularly in terms of access for news gathering purposes.

Nation Magazine v. U.S. Dept. of Defense, 762 F.Supp. 1558, 1563 (S.D.N.Y. 1991) (footnote omitted). Petitioners sought the opportunity to establish the full historical record of press access to American battlefields to support a *Richmond Newspapers* analysis, but were denied discovery by the District Court's granting of Respondents' motion to dismiss.

Citing *Center of National Security Studies v. Department of Justice*, 331 F. 3d at 934, the Court of Appeals rejected the *Richmond Newspapers* analysis as a means of evaluating whether the press enjoys a qualified right of access to the battlefield simply because "neither the Supreme Court nor this Court has applied the *Richmond Newspapers* test outside

the context of criminal proceedings or the transcripts of such proceedings" (A 12). Ironically, though this Court has never applied *Houchins v. KQED, supra,* to determine whether a First Amendment right of press access to the battlefield exists, the Court of Appeals proceeded to extend the *Houchins* rule that the press has no First Amendment right of access to prisons to cover reporting in the war zone, despite patently obvious and serious differences in the contexts in which such free press rights are asserted. Petitioners submit that this important question of First Amendment jurisprudence should not have been decided by default to an inappropriate prison access analysis, particularly when there is a more fitting test readily available: *Richmond Newspapers.* Accordingly, Petitioners respectfully submit that this Court should grant review to determine whether, on this pre-discovery record, the Court of Appeals correctly determined that the First Amendment does not apply to the Defense Department's administration of its combat zone press access scheme, and, necessarily, whether the Court of Appeals properly applied the *Houchins* analysis instead of *Richmond Newspapers* to this limited record.

POINT II

RESPONDENTS' MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED ON A LIMITED, PRE-DISCOVERY RECORD

Though the District Court may, in its discretion, refuse to exercise its power under the Declaratory Judgment Act, 28 U.S.C. § 2201 if it concludes that issuing a declaratory judgment would serve no useful purpose, it is not mandated to do so on a motion to dismiss a complaint. *Wilton v. Seven Falls Co.*, 515 U.S. 271, 287-88, 115 S.Ct. 2137 (1995); *see also,* 12 Moore's Federal Practice, § 57.42 [1], pp. 57-102 (3d ed. 2001). In the instant case, the District Court

dismissed Petitioners' amended complaint, in large part, because it was reluctant to decide the unsettled issue of a First Amendment right of press access to the battlefield in light of its earlier conclusion that Petitioners did not have standing, and that Petitioners' as-applied claims were not ripe (A 42-46). As the Court of Appeals observed, however, a true case and controversy did exist because, contrary to the District Court's determination, Petitioners were, in fact, denied access to the battlefield (A 10). Yet, despite its jurisdictional conclusion, the Court of Appeals determined on this very limited factual record that it was proper to refuse to extend declaratory relief because the First Amendment does not provide any right of press access to the battlefield, and even if the *Richmond Newspapers* analysis applied, there was no proof in the record of a historical basis for media access to troops in combat or that the Department of Defense guidelines were unreasonable or applied to Petitioners unconstitutionally (A 14-17).

First, regardless of whether *Houchins* or *Richmond Newspapers* applies, Petitioners should have been permitted a fair opportunity to develop a factual record through discovery to support their claims that practical factual evidence and history demonstrate that the First Amendment affords the press at least a qualified right of access to the battlefield. Second, Petitioners should have been allowed discovery to establish that the Defense Department's combat zone press access scheme was not administered in a constitutional way; that Respondents did not honor Petitioners' constitutional press access rights, and used the vague standards of Directive 5122.5, Enclosure 3, to deprive Petitioner (and possibly others) of those rights by inaction, redirection, or delay, without recourse to prompt administrative appeal relief.

The central purpose of the F.R.Civ.P. 8 pleading standard is to ensure that the complaint contains information sufficient to put the opposing party on notice of plaintiff's claim. *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99 (1957) (footnote omitted) [noting that Rule 8 requires only "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"]. Petitioners' amended complaint accomplished that objective with ease, with respect to both the facial and as-applied claims, and it should not have been dismissed without any discovery, especially given that Petitioners had suffered injury in fact and presented a serious and live controversy for resolution by the court.

CONCLUSION

Petitioners respectfully submit that the Court should grant their petition for a writ of certiorari to the Circuit Court of Appeals for the District of Columbia in order to allow Petitioners to vindicate their First Amendment rights as members of the press to have access to the battlefields in which American soldiers are engaged in combat.

Respectfully submitted,

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